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No. 86-1222

In The
Supreme Court of the United States
October Term, 1986

DALE E. KRAUS, ET UX., ET AL.,
Respondents/Appellees,

vs.

COUNTY OF PIERCE, ET AL.,
Petitioners/Appellants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a Motion for Summary Judgment on the grounds that police officers have qualified immunity from suit is denied on the basis that there are genuine issues of material fact as to whether the Plaintiffs, as claimed, were arrested without probable cause, is the order denying the Motion for Summary Judgment an appealable final decision?

2. On September 29, 1984, was the law clearly established that police officers cannot arrest individuals without probable cause?

3. Where individuals are ordered by a police dispatcher to leave a home, and when after exiting the home they are surrounded by at least five police officers, some of whom have weapons drawn, and are ordered to kneel on the ground at gunpoint, have the individuals been arrested?

4. Where a robbery by a black male occurs near a crowded parking lot, and a car is seen leaving the parking lot in a reportedly rapid manner, but the individuals inside the car cannot be identified by sex or race, and there are no other links between the owner of the car and the crime scene, is there probable cause to arrest the owner of the car for the commission of the robbery?

5. Where a governmental defendant in a civil rights action moves for summary judgment, prior to the taking of discovery depositions, on the basis that there was no policy or practice of unreasonable searches or seizures, and the motion is denied, is the order denying the Motion for Summary Judgment an appealable final decision?

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I. STATEMENT OF THE CASE

On September 29, 1984, at approximately 7:50 p.m., a white male was robbed by a black male in front of a First Interstate Bank cash machine in the Villa Plaza Shopping Mall in Pierce County, Washington. App. "C", pp. 1-2. A witness, Robert Paul Kay, Jr., had observed the victim and the suspect conversing. As the suspect left the victim, Mr. Kay approached the cash machine and the victim, and was informed by the victim that he had just been robbed. Mr. Kay got back into his automobile and attempted to follow the suspect, but lost him in the nearby Thriftco parking lot. App. "C", pp. 3-4.

Subsequent to losing the suspect in the parking lot, Mr. Kay apparently observed a red vehicle leaving the parking lot in what he felt was a rapid manner. He noticed that the vehicle "rolled through the stop signs" where the parking lot enters the street. He followed the vehicle down 100th Street, and then proceeded to the Pierce County Sheriff's Office, Lakewood Precinct. At the precinct, he reported that he had witnessed a black man robbing a white victim and that he had followed the suspect for a time, but had lost him. He reported that he had seen a red vehicle with Washington plates "KRAUS 2" leaving the parking lot in what he felt was a rapid manner. App. "C", pp. 4-5. He could not identify the sex nor the race of either of the two occupants of the vehicle. App. "C", p. 13.

The Sheriff's Office used the information from Mr. Kay to determine the address of the owner of the car and made no further inquiries of Mr. Kay. The officer who took the information from Mr. Kay did not ask him wheth-

er any occupant of the car looked like the robber, or why he believed the car was connected with the robbery. App. "C", pp. 4-5, 24-26. Several deputies were immediately dispatched to the address of the car's owner, Dale Kraus, and the deputies set up a perimeter surrounding the house. App. "C", pp. 50-51.

Todd Montgomery and Cindy Kraus were at the Thriftco store renting a movie on the evening of September 29, 1984. The parking lot was very crowded. They left the parking lot in a red Honda owned by Dale Kraus, Cindy's father, and proceeded home down 100th Street. There was nothing peculiar about the way in which Mr. Montgomery was operating the car. App. "C", p. 36.

Dale Kraus and Rosetta Kraus, husband and wife, own and reside in a home located at 9004 Lorraine Avenue South, Tacoma, Washington, with their daughter, Cindy. None of the four individuals are black. Shortly after Mr. Montgomery and Cindy Kraus arrived at the Kraus residence with the movie, the four individuals began watching the movie in the living room. Window curtains were wide open, and one could easily see inside and observe that the four individuals are white and were casually watching television. App. "C", p. 31.

At some point after the four individuals began watching the movie, the Pierce County Sheriff's Deputies surrounded the Kraus residence. Shortly thereafter, Mr. Kraus was contacted, by telephone, by a dispatcher from the Pierce County Sheriff's Department, and was ordered to come out of the house in order to be interrogated by sheriff's officers regarding a robbery. Mr. Kraus looked outside but was unable to see any sheriff's officers. He

then stepped outside the house. Spotlights were immediately shined into his eyes, and shotguns pointed at him. Mr. Kraus was ordered to put his hands up, and then repeatedly ordered to put them higher. He was ordered to walk towards the officers, who continued to shine the spotlights on him and to point shotguns at him. His requests for information as to what was happening were ignored. App. "C", pp. 31-32.

Mr. Montgomery also came out of the house. He too was confronted by bright lights, and was told to freeze, put his hands in the air, and walk forward while shotguns were pointed at him. App. "C", p. 37. When Mr. Montgomery reached Mr. Kraus, both were ordered to walk toward the officers, then ordered to turn around and kneel down on the ground while holding their hands over their heads. The officers continued to shine lights on both individuals, and to point shotguns at them. After being forced to remain on the ground for a period of time, the two individuals were told that the officers were investigating a robbery, but neither fit the description of the robber, and that they could get up. App. "C", pp. 32-33.

After Mr. Kraus and Mr. Montgomery were permitted to get up off the ground, some of the officers entered the house and searched a portion of the premises. App. "C", p. 33. Each of the individuals were questioned as to their names, addresses, phone numbers and places of employment. The officers then left. App. "C", p. 38.

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II. REASONS FOR DENYING PETITION

A. The Order Denying The Motion For Summary Judgment On The Grounds That The Sheriff's Deputies Have Qualified Immunity From Suit In This Matter Is Not An Appealable Final Decision.

It is clear that, ordinarily, the denial of a motion for summary judgment does not dispose of the case and is not final. *Jones v. St. Paul Fire and Marine Ins. Co.*, 108 F.2d 123 (5th Cir. 1939); *In re United So. Cos.*, 410 F.2d 377 (5th Cir. 1969). Petitioners have relied on *Mitchell v. Forsyth*, 53 U.S.L.W. 4798, 4803, 105 S.Ct. 2806, 86 L. Ed.2d 411 (1985), as authority for the proposition that denial of the motion for summary judgment in this matter was a final decision. However, in *Mitchell*, at 4803, the Court held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable final decision.

The Order denying Defendant's Motion for Summary Judgment makes clear that the District Court found genuine issues of material fact which preclude summary judgment. App. "A", pp. 20-21.

It is submitted that, in a civil case, where the issue is whether a warrantless arrest was supported by probable cause, the question of existence of probable cause is for the jury. See *Gilker v. Baker*, 576 F.2d 245, 247 (9th Cir. 1978). To allow an appeal in each instance where police officers are alleged to have made a warrantless arrest without probable cause, and a summary judgment motion claiming qualified immunity on behalf of the police officers is denied, would serve only to clog the appellate

courts and delay trials, and would not be consistent with the intent of this court in *Mitchell v. Forsyth, supra.*

B. At The Time Of The Incident Which Is The Subject Of This Matter, The Law Was Clearly Established That Police Officers Cannot Make An Arrest Without Probable Cause.

Probable cause for an arrest exists where the arresting officer has knowledge of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). An arrest is unlawful if made without probable cause. *Wong Sun v. United States,* 371 U.S. 471, 479, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

According to the test for qualified immunity established by this Court, the deputies in this case are immune from suit if "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Any reasonable police officer would have known, at the time of this incident, that it was clearly established that an arrest without probable cause violates the constitutional rights of the person arrested. There is no split of authority on the issue of qualified immunity as it applies to this case, as there is no authority from any jurisdiction which would authorize the actions taken by the deputies.

C. Dale Kraus And Todd Montgomery Were Arrested When They Were Ordered To Leave The Home, Surrounded By Deputies Shining Spotlights On Them And Pointing Shotguns At Them, And Ordered To Kneel On The Ground At Gunpoint.

A person has been arrested, or "seized" pursuant to the Fourth Amendent, when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1979). A seizure occurs when "a police officer accosts an individual and restains his freedom to walk away." *Brown v. Texas,* 443 U.S. 47, 50, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1978), citing *Terry v. Ohio,* 392 U.S. 1, 16, 20 L.Ed.2d 889, 88 S.Ct. 1968 (1968). Circumstances which amount to "a show of official authority such that 'a reasonable person would have believed he was not free to leave' " constitutes a seizure. *Florida v. Royer,* 460 U.S. 491, 502, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983), citing *Mendenhall, supra.*

Petitioners argue that the conduct of the deputies amounted to no more than an investigatory stop, as authorized initially in *Terry v. Ohio, supra.* In *Terry,* this Court approved a brief, on-the-spot, stop and frisk for weapons without probable cause since such action is much less severe than the intrusiveness of a traditional arrest. This conduct was approved in instances where a police officer *observes* unusual conduct, and believes that those he is dealing with may be armed and dangerous. In such instances, he may "conduct a carefully limited search of the outer clothing" in order to discover weapons. *Id.,* at 30. Nothing in *Terry,* nor any other case,

in any jurisdiction, authorizes police officers to order individuals out of their homes at gunpoint, and it is chilling to think that *Terry* would authorize such conduct.

In addition, *Terry* stops, while they do not require probable cause, do require a "reasonable suspicion" that the person stopped is engaged in criminal activity, and the means employed to effect the stop must be the least intrusive available. *Florida v. Royer, supra,* at 499-500. Again, the deputies had nothing to link the car observed by Mr. Kay nor its occupants to the crime scene, so they did not even have the required "reasonable suspicion," and ordering Mr. Kraus and Mr. Montgomery out of the house cannot be characterized as a limited intrusion. Rather, it was a blatant violation of the Fourth Amendment right of persons to be secure in their houses, against unreasonable seizures.

Petitioners argue that the Ninth Circuit disregarded decisional law from the State of Washington in making its determination that Mr. Kraus and Mr. Montgomery were arrested without probable cause, and argue that this is improper because police officers are only familiar with decisions by the United States Supreme Court and the local state appellate courts. Interestingly, Petitioners nonetheless rely on decisions from the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, United States District Courts from California and North Carolina, and the Supreme Courts of Oregon and Vermont to support their position.

Significantly, each case cited by Petitioners in support of their position that the conduct of the deputies amounted only to a *Terry* stop involved either an on-the-spot stop of individuals on foot in a public place (see

Terry v. Ohio, supra; Florida v. Royer, supra; United States v. Montoya De Hernandez, 473 U.S. —, 87 L.Ed.2d 391, 105 S.Ct. 3304 (1985) (border search at airport of suspected drug smuggler not subject to probable cause or reasonable suspicion requirements)), or a vehicle stop following which the occupants of the vehicle were detained. In *United States v. Hensley,* 469 U.S. 221, 83 L. Ed.2d 604, 105 S.Ct. 675 (1985), the driver of a vehicle was stopped based on a description of the *driver,* not the vehicle, identifying him as an armed robbery suspect. In *United States v. Sharpe,* 470 U.S. 676, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985), a driver of a vehicle suspected to be transporting marijuana was ordered to stop and refused to stop, following which he was pursued, eventually stopped, and detained. Similar facts gave rise to the holding in *State v. Thompson,* 558 F.2d 522 (9th Cir. 1977).

In *State v. Taylor,* 716 F.2d 701 (9th Cir. 1983), DEA agents obtained a warrant to search the home of a suspected drug trafficker, and upon arrival at the home, the suspect attempted to flee in an automobile. The officers who confronted the suspect after they stopped his automobile had specific knowledge that that individual was likely armed and dangerous. The Court ruled that the armed approach, the handcuffing, and the arrest of the individual whose home the officers had a warrant to search and who had fled the home, was reasonable. *State v. Wakely,* 29 Wn. App. 238, 628 P.2d 835 (1981), the only authority from the State of Washington relied on by Petitioners to support their claim that no arrest was made, involved the stopping and detention of a suspect in a shooting incident, based on a description of *both* the suspect and the vehicle.

Finally, *State v. Hewey*, 144 Vt. 636, 471 A.2d 236 (1983), involved a routine license check of the driver of a vehicle, and *State v. Jackson*, 296 Ore. 430, 677 P.2d 21 (1984), concerned a plain view search following a stop for a traffic violation.

In *Payton v. New York*, 445 U.S. 573, 589, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), this Court made clear that nowhere is the Fourth Amendment zone of privacy "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " This incident did not occur on a city street; rather, a house was surrounded, and individuals ordered out of the house. The officers were not detaining individuals as the result of a valid stop in order to search for weapons. They were conducting an investigation, using unreasonable and unlawful means.

D. The Information Upon Which The Deputies Acted In Making The Arrests Did Not Amount To Probable Cause To Believe That The Occupants Of The House Had Committed A Robbery.

Petitioners cite various decisions, again, from various jurisdictions throughout the country, in support of their proposition that the deputies did have probable cause to arrest Mr. Kraus and Mr. Montgomery. However, as noted by the Ninth Circuit, the cases relied upon by the Petitioners contain a link between a vehicle and its occupants to a crime or its scene, a link which is absent in this case. *Kraus v. Pierce County*, 793 F.2d 1105, 1109 (9th Cir. 1986).

Petitioners fail to fully state the facts in certain cases cited. In *State v. Gluck,* 83 Wn.2d 424, 518 P.2d 703 (1974), two police officers noticed a vehicle parked in front of a tavern, in an isolated part of a block, between 4:00 and 5:00 a.m. The car pulled away when the occupants noticed a police car. The suspect car was then pulled over, and the occupants observed and questioned. Later, on the basis of information provided by the first officers, two other officers, possessing information that the tavern had been forcibly entered, stopped and detained the occupants, and the first officers were called to the location of the stop, and the occupants were then arrested. Thus, the probable cause to arrest was based on the observations of the *suspects,* not just the vehicle, and information linking the suspects to the crime.

In *State v. Young,* 39 Wn.2d 910, 239 P.2d 858 (1952), a robbery victim identified *the car* used by the robber, and that car was subsequently stopped and the occupants arrested. In this case, the robbery victim identified no car, and the witness provided no link between the Kraus vehicle and the robbery, other than its location in a crowded adjacent parking lot.

State v. Donohoe, 39 Wn. App. 778, 695 P.2d 150 (1985), another case cited by Petitioners, was decided after this incident, and involved probable cause to search, not arrest. In that case, a Chevrolet Blazer with Idaho license plates was identified as having been in the vicinity of a 1:30 a.m. burglary, and was again spotted at 2:30 a.m. by a police officer, who had heard a broadcast concerning the burglary, and spotted property in the car similar to that which was stolen. At 4:25 a.m., the vehicle was again spotted,

the occupants detained, and a search warrant obtained to search the vehicle.

Similarly, each and every other case cited can be distinguished in that, in each case, there is a direct link between a vehicle and its occupants to a crime or its scene. According to Petitioners' reasoning in this case, anyone seen leaving the crowded shopping center parking lot at the time of the incident who appeared to be in a hurry was a potential suspect. It is unimaginable that, on the basis of the information that the deputies had at the time they surrounded the home, any neutral and detached magistrate would have found probable cause to issue a warrant for the arrest of Mr. Kraus. No reasonable police officer would have believed that there was probable cause for the arrest.

Petitioners' reasoning is also flawed in that they appear to argue that unless there is precedent which states that under identical facts there was no probable cause to arrest, the law is not clearly established. Acceptance of this theory would result in a rule that police officers are shielded from liability for any unlawful arrest unless there is a case in which the issue of probable cause was decided under identical facts. Such a rule would virtually eliminate civil rights actions alleging unlawful arrest.

E. The Order Denying Pierce County's Motion For Summary Judgment Is Not An Appealable Final Decision, And There Are Genuine Issues Of Material Fact As To Its Liability Which Require Discovery.

On September 6, 1985, an Order staying discovery was entered in this matter, which precluded the taking of the

depositions of the deputies and their superiors. App. "B", pp. 4-5. Without the benefit of such discovery, the Plaintiffs could not present evidence of policy or custom on the part of Pierce County which would subject it to liability. Pierce County, of course, could not, and did not, claim it was immune from suit. *See, Owen v. City of Independence,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). Certainly, it would have been inappropriate for the District Court to have considered Pierce County's Motion for Summary Judgment when the Plaintiffs had not had the opportunity to take discovery depositions of the deputies and their superiors.

Fed.R.Civ.P. 56 (f) allows for the continuance of a summary judgment motion to permit depositions to be taken. In this case, Petitioners were granted a stay of discovery pending a decision on their summary judgment motion. Such a procedure should not be sanctioned, as Plaintiffs should always have an opportunity to fully discover their case.

Finally, as noted by the Ninth Circuit, *Mitchell v. Forsyth, supra,* does not allow the automatic appeal of summary judgments involving governmental employers, as immunity is not a defense. *Kraus,* 793 F.2d at 1108.

CONCLUSION

It is respectfully submitted that there is no split of authority as to whether the deputies have qualified immunity from suit in this matter, and for that reason, and the other reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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